

Nelson B. Befitel
Testimony for the House Committee on
Labor and Public Employment
The Administration's Omnibus
Workers' Compensation Reform Bill
House Bill 2486 – Relating to Workers' Compensation Reform

Chairman Oshiro, Vice Chairman Nakasone and Members of the House Committee on Labor and Public Employment. My name is Nelson Befitel and I am pleased to be here to discuss a very important issue - The Department of Labor and Industrial Relations' proposals for Workers' Compensation reform.

I. INTRODUCTION

First, I would like to express my appreciation on your decision to hear these proposals. I am glad that you have brought this very important issue to the forefront of the 2004 Legislative Session.

Second, the omnibus bill we presented to the Legislature contained nine major components. We must stress that the reason for presenting an omnibus bill was to demonstrate that there is no "silver bullet" or one single item that will effectively reduce the soaring costs of workers' compensation.

In other words, there are no homeruns in our Bill, just singles and doubles. But they will get us to home plate if they are passed together into law and then properly executed by our Department.

Late last week, we learned that Chairman Oshiro divided our omnibus bill into nine different sections for today's agenda. However, with your understanding and permission, I would like to proceed by presenting a comprehensive testimony on all nine measures, as the Department believes that they must be considered

together in a comprehensive package rather than on a piecemeal basis. I will go over the specific measures as they are listed on the agenda.

[RECEIVED PERMISSION]

I would also like to point out that many of the testimony received from the public are meant for the omnibus bill - HB 2486 – and request that you apply the testimony for all of the bills on our agenda.

You should have in front of you a copy of the Department's testimony entitled "Testimony to the Legislature for Workers' Compensation Reform." I will summarize that testimony, but from time to time, I will be pointing out specific charts in it to support my verbal testimony today.

III. Need For Workers' Compensation Reform

Why do we need workers' compensation reform?

We need reform because Hawaii's businesses are paying too much for workers' compensation premiums. According to a recent study, Hawaii has the **THIRD** highest in the entire nation when it comes to premiums.

To put this in perspective, Hawaii's businesses pay nearly **THREE-DOLLARS and FIFTY CENTS (\$3.50)** for every hundred dollars in wages. Hawaii is ranked only behind Florida and California, two states who have been forced to overhaul their workers' compensation system with drastic reforms.

Last year, when the Pacific Business News polled the business community, **SEVENTY-THREE PERCENT (73%)** of them said that workers' compensation costs, along with mandated health insurance, was their **NUMBER-ONE** issue.

For years, our state government has told businesses that they must reduce their workplace injuries if they want to lower their workers' compensations cost.

Since 1994, Hawaii's business community has done just that.

Hawaii's employers are providing a safer and healthier workplace. Accordingly, we have less workers' compensation claims.

On page 8 of our testimony, Graph 1, illustrates that in 1995, the State processed nearly FIFTY-NINE THOUSAND (59,000) workers' compensation cases.

In 2002, there were FORTY-FOUR THOUSAND claims. That is FIFTEEN HUNDRED (1,500) fewer claims.

In other words, workers' compensation claims have reduced over 35% over that eight-year period.

As the Charts on pages 8 through 15 clearly illustrate, the number of claims have steadily decreased for every industry, and yet the costs for each claim have continued to rise.

On page 9, Graph 2 tells us that the costs per case have increased from averaging approximately FIFTY FIVE HUNDRED DOLLARS (\$5,500) per case to SIXTY ONE HUNDRED DOLLARS (\$6,100) in 2002.

To summarize - Hawaii's employers have done what we have asked them to do – reduced workers' compensation claims. Yet, some of our businesses are experiencing double-digit percentage premium increases year after year.

We have a system where insurance carriers are forced to stop insuring a company as soon as the first claim is filed.

We can no longer tell businesses that they control their own destiny when it comes to lowering the costs of workers' compensation.

It is time our state government holds its side of the bargain.

The Department's proposals to fix our workers' compensation system are not new.

They have been introduced and, in some cases, even passed out of this Committee. These proposals are fair and carry out the primary goal of workers' compensation – which is – to provide the injured workers immediate, quality treatment and the best care available, so that they can return to work as soon as they are able, and continue to be productive members of our society.

I will now go over the proposals in the order they are listed on the Agenda.

IV. THE PROPOSALS

1. Small Business Owner-Employee Exemption

Currently, a person who owns 50% of a corporation is exempt from obtaining workers' compensation. However, this exemption does not apply to other entities such as a limited liability company, partnership, and limited liability partnership.

This proposal would expand this small business-owner exemption to these types of small businesses entity. Therefore, owners and/or partners of a small business – regardless of the type of business entity – would be allowed to opt out from purchasing workers' compensation coverage for themselves. They would still be required to obtain workers' compensation coverage for their employees.

The intent of workers' compensation is to protect employees from medical costs and lost wages, it should not be mandated upon employers or partners who do not wish to be covered.

It is uncommon for an employer to sue himself or file for workers' compensation.

Our proposal is consistent with the intent of protecting employees while helping employers reduce overhead costs by allowing businesses to save on workers' compensation premiums.

2. Intensify Crackdown on Fraud

From 1999 to 2002, only 83 claims alleging fraud were filed with the Department. Only 18 fraud claims in the last four years were upheld.

More importantly, the Department, in recent history, has not pursued any criminal action for fraud.

These numbers indicate that our State has not aggressively pursued workers' compensation fraud, and that our current system provides little incentives for private parties to pursue fraud on their own.

We believe our proposal will improve the system. There are two components:

First, we want to expand the Insurance Commissioner's jurisdiction to investigate and prosecute fraud in the workers' compensation arena. The Insurance Commissioner's staff has been successful in investigating and prosecuting fraud in the automobile insurance arena, and we believe that it is natural to expand their expertise to the workers' compensation.

Second, we want to provide private parties with better incentives to pursue a fraud claim on their own through our administrative process.

Under our current system, it is not cost-effective for private parties to pursue fraud.

Therefore, our proposal would mandate that upon a finding of fraud, the prevailing party shall be entitled to restitution, reimbursement of his costs to bring the action, and 50% of the administrative fines.

3. Require Attending Physician to Be a Medical Doctor or Dentist; Place Reasonable Limits on Palliative Care.

We want to require that either a medical doctor or dentist serve as the injured worker's primary treating physician or "Attending Physician."

I would like to be very clear when addressing this issue. The Department certainly believes that alternative health care providers – such as chiropractors, naturopaths and others - provide quality treatment to injured workers. However, these services are expensive and, often times drive the costs of treating the injured worker.

Workers' compensation is a social insurance intended to protect the medical and financial health of workers, while ensuring the stability and financial health of employers. It is a balancing act that as policy leaders we must fully recognize and address.

Workers' compensation was never, and should never, be a profit making enterprise. The system should compensate the providers adequately and ensure that injured workers receive the best possible care.

We do not believe we will jeopardize the health of our injured workers by requiring that their “Attending Physician” be a medical doctor or dentist. At the same time, this proposal will likely reduce the cost of workers’ compensation claims.

I would like to direct your attention to pages 22 and 23.

The study presented here is a snap shot of approximately SEVENTEEN-THOUSAND SIX HUNDRED (17,600) closed cases from 1995 to 2003.

This study was to address two issues:

First, how many of these cases were handled by medical doctors and how many were handled by alternative health care providers.

Second, the total costs of these cases that can be attributed to each of these two groups.

The results: Only SIX PERCENT (6%) of the cases were handled by alternative health care providers.

However, these providers accounted for FORTY-FIVE PERCENT (45%) of the total costs of the entire group of cases.

While the Department acknowledges that this was not a perfect scientific study, it does follow the conclusions of national studies that show the wide discrepancy in costs for services between medical doctors and non-medical doctors. These studies are referenced in my written testimony.

Let’s be clear – we are not proposing that we preclude healthcare providers such as chiropractors, naturopaths, massage therapists and others from treating injured workers.

What we are proposing is that these treatments be made only upon a medical doctor's referral.

We are also proposing that these referrals be limited to the first 60 days or 15 treatments, whichever occurs first.

However, the Department may grant further treatments in appropriate situations.

The Department's proposal to require the attending physician to be a medical doctor ensures that the injured employee receives the best possible care at a better price.

4. Limit the Duration of Temporary Total Disability (TDD) to 104 weeks; Define Maximum Medical Improvement.

We want to limit the duration a person can be out of work on temporary total disability, or TDD status, to 104 weeks. We also want to clearly define Maximum Medical Improvement.

Temporary Disability is just that – a temporary injury. We believe that after two years, the treating physician should be able to make a determination whether or not the injury is permanent.

Once the doctor has made such a determination, the parties will be able to enter into a settlement of the claim. This will result in the injured worker being promptly compensated for his permanent injury.

Capping the duration of TTD is not new; several states including Massachusetts and Minnesota already do so. Further, we have placed safeguards to allow for continuation of TDD in extreme cases.

We also want to place reasonable requirements on palliative care, which are treatments that do not cure the injury. It only temporarily relieves the symptoms.

If the injury is only temporarily relieved, and cannot be permanently improved, then that injured worker has suffered a permanent injury. He should therefore be compensated for his permanent disability rather than being on Temporary Disability Status.

5. Place Reasonable Requirements on Vocational Rehabilitation.

We want to enact cost-effective measures on Vocational Rehabilitation, or VR, that will result in the injured worker getting back to work as soon as he is able to find suitable employment.

Of all the costs that have escalated during the last eight years, vocational rehabilitation costs have risen the fastest.

The purpose of Vocational Rehabilitation is to restore an injured worker to his earning capacity before the accident in a suitable position “as quickly as possible in a cost-effective manner.”

Currently, the employee selects his or her own VR counselor without any input from the employer.

This has led to confusion, misunderstandings, delays in getting the worker back to work, and sometimes, placed the employer and employee, at odds, from the start.

Our VR proposal includes three major components that will make the system more efficient and will discourage abuse.

First, we require that the employer be involved in designing the VR program from start to finish.

Second, the employer can satisfy his obligation under the VR requirements, by making adjustments to the workplace to allow the employee to return to work at a suitable wage. This will encourage employers to take measures that will return the injured worker back to work.

Third, we are proposing to reasonably limit Vocational Rehabilitation to 104 weeks. If the employee is not able to return to suitable work, than the parties must resolve the claim taking into account the claimant's injuries and lost wages.

6. Improvements to Emergency Room Fees and the Medical Fee Schedule Process.

Our proposal would allow emergency room doctors to charge for "usual and customary" fees for treatment during the first 48 hours of the injury. These charges would be capped at 200% of the Medicare fee schedule.

This measure would ensure that injured employees who enter the emergency room receive the best and most expedient care available in their critical time of need.

This is in line with our goal of providing injured workers the best medical attention possible so that they can be treated and promptly return to work and continue to be contributing members of our society.

We are also proposing a procedure that will help expedite the process in approving adjustments to the medical fee schedule so that service providers can be adequately compensated without delays.

7. Encouraging Alternative Dispute Resolution.

We are proposing that this State establish a strong public policy encouraging arbitration and mediation in the workers' compensation program.

Our proposals are patterned after Hawaii's arbitration laws. They provide the fundamental requirements of a valid and enforceable arbitration and/or mediation agreement.

This process is not mandatory; they must be voluntarily entered into by both parties.

Alternative dispute resolution is often more efficient and cost-effective in settling disputes as opposed to the administrative agency process. This process would expedite decisions and save the workers' compensation system from additional costs.

**8. Eliminating Mental Stress Claims for
Personnel Actions Taken in Good Faith.**

We are proposing once again that this Legislature pass a law precluding stress claims resulting from personnel actions taken in good faith from being compensable.

Personnel actions include disciplinary action, counseling, work evaluation or criticism, job transfer, layoff, promotion, demotion, suspension, termination, retirement, or other actions ordinarily associated with personnel administration.

This measure ensures that employers can exercise their lawful management right to take personnel action without fear of workers' compensation liability.

Employers should not be punished for making good faith personnel decisions that best serve their business.

**9. Managed Care; Employer's Network of
 Physician Care for the first 120 days.**

Our final provision, which we believe will have the greatest impact, is the Employer's Choice of Network of Physicians.

This proposal would allow employers the opportunity to provide their employees with an employer-designated healthcare provider list of at least three attending physicians or physician networks. FIFTY-PERCENT (50%) of them must practice on the island where the injured employee resides.

The employee would then be mandated to see someone from the physician network for the first 120 days of injury.

The injured employee would then be allowed to "opt out " of the plan after the first 120 days, and see a physician who is not on the list.

This proposal would establish a relationship with the doctor and the employer, in addition to the doctor and the patient relationship.

It will ensure that the doctor considers and serves the interest of both the employee and employer and – that is – to provide efficient quality treatment so the employee is able to return to work.

For those who fear that we are bringing back the old days of “Company Doctors,” we ask that you consider this measure based on today's advanced medical technology, the many safeguards in place, and the laws regulating the practice of medicine.

I would like to direct your attention to pages 18 through 20.

These pages reflect the City and County of Honolulu’s experiences during the last eight years. What these graphs show is that while injuries have decreased, Temporary Total Disability, or TTD, and medical costs have increased. These factors contributed to the City’s increase in lost workdays.

Our study shows a developing trend – health care providers are treating injured workers for a longer duration, and consequently, workers are staying out of work longer.

This fact is disturbing, considering that injuries we are seeing today are no more severe than what they were in 1995. Yet, it is taking longer to return these employees to work.

Some of you may remember that in 1995, when the “110% of Medicare medical fee schedule” was enacted, the Legislature was warned that providers would extend treatment to recoup the costs.

The data compiled by our Department strongly indicates that this is the case today.

Our proposal provides employers the ability to help control medical costs. Healthcare providers will be more prudent in their treatments as they have to serve the interest of both the injured worker and the employer.

As discussed on page 34 of our written testimony, physician networks have been effective in reducing the costs of workers’ compensation claims. Medical costs have been reduced from 16 to 46 percent.

V. CONCLUSION

In conclusion, our omnibus bill – which is separated into nine bills on today's agenda - attacks all cost drivers of workers' compensation insurance.

This bill will benefit both businesses and employees. By reducing the costs of workers' compensation, businesses will be able to expand and be able to hire more employees. We will be able to attract more businesses to Hawaii to help diversify our economy. Our hard-working neighbors who own small businesses, will be able to stay in business, so that they to, can support their families.

Hawaii's business community and our working families deserve action. Not more studies and delays, but a comprehensive workers' compensation reform package that will provide meaningful results.

I thank you for the opportunity to testify.

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